No. 22364 and A

In the

United States Court of Appeals

For the Ninth Circuit

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellant,

vs.

OLYMPIA BREWING CO.,
a corporation,

Appellee.

OLYMPIA BREWING COMPANY,
a corporation,

Appellant,

vs.

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellee.

On Appeal from the United States District Court
for the Northern District of California

Reply Brief of Beverage Distributors, Inc., as Appellant and Answering Brief on Cross-Appeal

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INTRODUCTION

This appeal, based entirely upon documentary evidence, permits this Court an unusual opportunity to give that "prompt and effective"[1] justice which eminent jurists have so stressed as of crucial importance. In words unfortunately applicable to this plaintiff, Chief Justice Warren has recently pointed out, in

1. 42 F.R.D. at 265. See also 29 F.R.D. 191 *et seq.*

criticism of the delays, congestion and frustrations of the judicial process:

> ". . . the client who cannot afford to wait for years for a judgment in the trial court suffers great injustice even if he eventually prevails."[2]

The thrust of Olympia's brief is toward delay. It commends to this Court a reluctance to resolve the factual issues (Olympia brief, page 19) and seeks, often without reference to the record, to reargue facts which Olympia once conceded (*infra* at p. 3). Therefore, we have largely devoted this brief to a showing that there is no basis for dispute as to the facts or the law.

SUMMARY OF ARGUMENT

Olympia's illegal territorial and customer restrictions are clearly proven not only by Olympia's established boundary lines, but also by its directions to distributors to stop competing in the few instances in which competition has occurred (*infra* at p. 4). Although now disputed by counsel for Olympia, there can be no serious question that Olympia adopted a fair trade program to frustrate BDI's efforts, in compliance with the *Schwinn* decision, to break into the exclusive territories (*infra* at p. 6). Nor can there be a doubt that the same illegal purpose prompted the immediate termination of BDI when it did succeed in breaking the barriers (*infra* at p. 13). Respect for California's fair trade laws should not justify refusal of injunctive relief against their use by Olympia to achieve a purpose illegal under the Sherman Act (*infra* at p. 16). They are dishonored by Olympia's misuse of them; not by the prevention of such misuse. BDI's detailed factual evidence of irreparable injury has been completely ignored in Olympia's brief (*infra* at p. 17).

ARGUMENT

1. Olympia's Recorded Admissions Prove It Used Fair Trade to Violate the Sherman Act.

Since the record is entirely a documentary one without findings, and since the issue as to Olympia's illegal purpose depends upon the effect of admissions of Olympia's own officers on deposition,

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2. Chief Justice Earl Warren: *The Administration of the Courts,* 51 JUDICATURE 196, 200 (January 1968).

this Court will make an independent determination of the legal conclusions and inferences from those admissions. *Fleischmann Distilling Corp. v. Maier Brewing Company,* 314 F.2d 149, 152 (9 Cir., 1963):

> " 'When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.' *Stevenot, v. Norberg,* 9 Cir., 210 F.2d 615, 619."

a. The testimony of Olympia's own officers establishes conclusively that Olympia has enforced an illegal system of territorial and customer restrictions.

The bald assertions by counsel that BDI did not prove territorial restrictions (Olympia brief, pages 9, 15) are overwhelmingly belied by the unimpeachable admissions to the contrary by Olympia's officers. Before the Court is the admission of Olympia vice president Thomas L. Morgan in an affidavit dated September 23, 1965 (R. 43):

> "Olympia Brewing Company has authorized each of its distributors to sell Olympia beer in well defined geographical areas which are not overlapping, and in that manner Olympia beer is available to the various retail accounts in all marketing areas."

Olympia sales director Phil Hannah admitted on July 27, 1967, that this statement by Mr. Morgan remained "substantially true" (R. 43). The only exceptions to this policy of territorial limitations were BDI (which could sell to Safeway stores only (*infra* at p. 5)) and a distributor which sells to Thrifty Drug Stores' central warehouse (R. 45). Olympia's maps which have been introduced in evidence clearly define the distributors' areas (Exhibits 1, 2). Olympia's sales director freely admitted that these maps designate distributors' areas (R. 46-52). Counsel's assertions to the contrary are completely unsupported by any substantial evidence in the record. As proof of its contrary assertion that "Olympia's distributors have complete freedom in selecting to whom and where they make sales" (Olympia brief, page 3), Olympia is only able to cite the following: (1) a general, undocumented self-serv-

ing affidavit of Olympia's president, conclusory in character and without reference to any specifics (R. 222-223); (2) a self-serving affidavit of an Olympia distributor, citing as proof his decision not to sell to BDI *after* Olympia had terminated BDI (R. 196-197); (3) Mr. Hannah's testimony of his conversation with the same distributor (Exhibit 4, Hannah deposition, pages 104-105):

> "A. . . . He wondered why he had received it, and I said we were no longer selling BDI. He said, well, you know what I'm going to do with this order. I am going to put it in the wastebasket. He didn't ask me what to do with it whatsoever.
>
> Q. Was there any other discussion between you and him on that subject?
>
> A. By this time, I think, I'm sure I told him of the suit filed against us by BDI."

The most that Olympia can glean out of that evidence is that after Olympia terminated BDI its other distributors were "free" to decide not to sell to BDI. That is what they all did, after talking to Olympia (Exhibit 14; Exhibit 3, pages 29-33).

Olympia's brief goes on to refer to "a variety of instances in which Olympia distributors were making sales beyond their areas of responsibility [Exhibit 4, Hannah deposition, pages 16-30, 216] without any reprisal or threat on Olympia's part [R. 44-45]" (Olympia brief, page 3). The cited testimony of Mr. Hannah at pages 16 to 25 of his deposition proves exactly the contrary. Mr. Hannah, Olympia's sales director, testified that he received a report that two distributors were delivering to the same area near Saugus, California (Exhibit 4, page 19). Mr. Hannah then "called up to establish who had been in there originally the longest" (*ibid.*). Mr. Hannah told the distributors that they could not both be calling on the same accounts (*id.* at 22, 24) and told them to solve it by establishing a boundary line (*id.* at 23-25). He said, "We suggested they all sit down and settle it one way or another, because this is economic idiocy" (R. 50). The cited testimony of Mr. Hannah at pages 26 to 28 of his deposition proves another instance which is directly contrary to the proposition cited by coun-

sel for Olympia: Mr. Hannah received a report from an Olympia salesman that two Olympia distributors were competing for sales in a newly developed area (*id.* at 26-27). The two distributors were told that only one of them should stay in the area (*id.* at 27-28). Other than the situation in mountainous areas where one distributor is permitted to sell "a very minimum number of accounts" in the winter and another in the summer, Mr. Hannah could think of no other instance in which there had been solicitation of one account by two or more different distributors at the same time (*id.* at 29).

Nor can counsel for Olympia be believed when they assert that BDI "was subject to neither customer nor territorial restrictions on its sales of Olympia in California" (Olympia brief, page 3). In his letter of July 28, 1958, to BDI, Olympia's vice president in charge of sales stated (R. 70):

> "In regard to the third and fourth paragraphs of your letter, we would at the present time desire to hold yourself to your indicated commitment not to sell our product to anyone but Safeway. If you should desire to effect sales to others than Safeway, please immediately contact us so that we may review the whole situation.
>
> "Historically, as you are undoubtedly aware, going back for almost half a century, it has been the policy of our company to effect distribution of its product through independent distributors who have been assigned a geographical area for service. . . ."

How can counsel say, as they have dared to do (Olympia brief, page 4), that Olympia's letter quoted above merely acknowledged BDI's letter and that "it did nothing else" (*ibid.*).

Olympia President Schmidt testified that this restriction on BDI had never been removed (Ex. 5, p. 43). The admissions of Olympia's own officers permit only a finding that Olympia, like Arnold, Schwinn & Co., "has been 'firm and resolute' in insisting upon observance of territorial and customer limitations by its . . . distributors" (*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1246 (1967)).

b. Olympia's own admissions establish conclusively that Olympia formulated the fair trade program and subsequently terminated BDI for the purpose of enforcing its illegal territorial and customer restrictions.

Olympia has again accused us of a misstatement (Olympia brief, page 6) in saying (BDI opening brief, page 7) that "Counsel for Olympia admitted in open court during the preliminary injunction hearing that Olympia fair traded for the purpose of making it 'difficult if not impossible for sales to be made by BDI' in competing with its method of distribution for Olympia business of its other customers (statement of David Toy, R.T., page 95)." We submit that the following concessions by counsel establish just such an admission (R.T. 93-95). Olympia's counsel first admitted that the following is a fair statement (R.T. 93):

> "MR PARKINSON: Let me put it the way we see it, if Your Honor please. I think it is clear, and they have admitted, that they fair-traded because of BDI's announcement that they were going to sell to others. . . ."
>
> "THE COURT: Well, do you concede that?
>
> * * * * * * *
>
> "MR. TOY: Stated that way, I think I might quibble with the words a little bit, Your Honor, but in substance that is a fair statement."

After careful clarification, Olympia's counsel then deliberately agreed to the following summary by the Court of his admission (R.T. 95):

> "THE COURT: All right. Then it seems to me your answer, to put it in somewhat different words, is that a primary or major consideration for fair-trading was to prevent BDI from selling at less than a wholesale fair-trade price to any central warehouse retailer, with the view that one of the effects of fair-trading would be to make it difficult if not impossible for sales to be made by BDI."

Since counsel for Olympia have now flatly denied making these admissions (Olympia brief, page 6), we have included the colloquy leading up to them as Appendix 1.

The actions and admissions of Olympia's officers, as well as the chronology of events corroborate Olympia's counsel's admissions. Olympia's timetable (Olympia brief, page 7), however, is misleading, since it conspicuously omits the fact that BDI's

letter announcing its intention to sell to customers other than Safeway was dated August 7th (R. 74), and that it was on August *8th* that Olympia decided to undertake its fair trade program (Exhibit 4, Hannah deposition, pages 65-66; R. 79-82). A more complete timetable follows:

Fall 1966—Theo. Hamm Brewing Co. instituted a wholesale fair trade program for its beer in California (Exhibit 4, Hannah deposition, page 38). Olympia president Schmidt concluded that Hamm's action was directed at BDI, which distributed Hamm's beer, as well as Olympia's, at central warehouse prices (Exhibit 5, Schmidt deposition, page 40; Exhibit 4, Hannah deposition, page 39). Hannah and his two assistants speculated that BDI would no longer be able to sell Hamm's beer to Safeway at Hamm's higher fair traded prices (Exhibit 4, Hannah deposition, page 47).

Fall 1966 - August 6, 1967—"Quite a number" of Olympia distributors inquired of Mr. Hannah from time to time whether Olympia had changed its position as to continuing to sell BDI (*id.* at 150-154). They asked specifically if Olympia were "looking at fair trading" (*id.* at 153-154). Mr. Hannah knew that "a substantial majority" of the Olympia distributors disliked BDI because they felt that BDI was "selling some very valuable customers in their area" (*id.* at 154):

> "In these conversations that you mentioned at the time of Anheuser-Busch termination of BDI and Hamm's fair trading, didn't anyone of these wholesalers say that they thought that Olympia ought to do the same?
>
> A. Yes.
>
> Q. They did?
>
> A. They said, 'Are you looking at fair trading specifically?' I think that was testified to. One of them specifically asked if we were going to at the time of Budweiser.
>
> Q. You understood that they were suggesting that Olympia should do the same thing?
>
> A. They didn't suggest, they asked.
>
> Q. They asked if Olympia was going to do these things?
>
> A. That is right.
>
> Q. Did they indicate whether or not they would like Olympia to do these things?

A. BDI is not going to win any popularity contest among the distributors down there.

Q. Why do you say that?

A. They feel they are selling some very valuable customers in their area.

Q. Is this feeling a general feeling from your knowledge of the market?

A. This would be my feeling, yes, sir.

Q. Do you know whether or not it is shared by almost all of your distributors, or all of them?

A. I can't speak for all of them, but I can say a substantial majority."

As Olympia president Schmidt testified, from time to time during this period Mr. Hannah would come in off a sales trip saying "Man, did I catch hell from a distributor" for continuing to sell to BDI (Exhibit 5, Schmidt deposition, page 37). On these occasions, Mr. Schmidt testified that the idea of terminating BDI and that of fair trading, as Hamm had done, "normally became part of the discussion, as ways and means in which to handle the situation" (*id.* at 38).

August 7, 1967—BDI notified Olympia by letter (R. 74) and orally through Olympia's counsel (R.T. 86) that BDI intended to sell Olympia beer not only to Safeway, but also to the central warehouse customers to whom BDI sold other brands. Mr. Hannah admits that the receipt of this notice from BDI was the occasion for Olympia's discussions on August 7 and 8, 1967, which led to the decision to fair trade (Exhibit 4, Hannah deposition, pages 49-50). Sales director Phil Hannah recommended that BDI be terminated. In support of that recommendation, he said (Exhibit 4, page 142):

> "I believe that a further extension of this Central Warehousing would be disastrous to us and the state is tremendously important to us. My recommendation was to take the first loss the quickest."

Mr. Schmidt testified that they discussed three alternatives (Exhibit 5, Schmidt deposition, pages 56-57):

> ". . . There actually were, let me say, three alternatives that we felt now that this had come to pass, and one would

> be to continue as we were, two would be to fair trade in order to ensure an orderly marketing of our product, and three would be to cut them off entirely. I asked Mr. Hannah, and of course Mr. Huffine at the same time, what their thoughts were as far as the three alternatives, what would happen if we would cut them off, what would happen if we fair traded, and, of course, we knew what would happen if we sold as they had requested."

Mr. Schmidt testified further that "we are familiar enough with the fact that if BDI sold to these other customers our present distributors could very possibly be hurt" (Exhibit 5, Schmidt deposition, page 69). Appendix 2 contains Mr. Schmidt's further testimony revealing his concern as to the effect on Olympia's distributors if Olympia had decided to take no action (*id.* at 58-60).

The fair trade program was decided upon in preference to Mr. Hannah's recommendation to cut BDI off entirely (Exhibit 5, Schmidt deposition, page 62). Since no one other than BDI had been selling under Olympia's "suggested" prices (Exhibit 4, Hannah deposition, page 182), there was no problem in working out the fair trade prices. Mr. Hannah immediately telephoned two distributors who readily agreed to sign the fair trade contracts (Exhibit 4, Hannah deposition, pages 64-68), and the execution of them was rushed through to completion on August 8th (R. 79, 81). Adolph Markstein, one of the distributors who signed, told Mr. Hannah that he thought BDI would not even be able to retain its Olympia business with Safeway at the fair trade prices (Exhibit 4, Hannah deposition, page 69).

Olympia and its distributors immediately cooperated to institute a close surveillance over BDI and its customers in order to determine the effect of the program: Before the fair trade prices took effect, Olympia distributor Adolph Markstein reported to Mr. Hannah and to Niels Nielsen, Olympia's Bay Area manager, that BDI had sold 500 cases of Olympia beer to Louis Stores (Exhibit 11). Markstein promised to report "any additional sales or other accounts they may sell" (*ibid.*). Commenting on BDI's sale to Louis Stores, Markstein said pointedly to Hannah: "We

are losing a good customer" (Exhibit 4, Hannah deposition, page 71). Hannah replied that Olympia was in litigation with BDI and said: "I can't discuss this too much, you know that Adolph" (*ibid.*). Home Ice and Cold Storage Co. obtained and mailed to Olympia a copy of a Von's-Shopping Bag memorandum showing that this retailer had received Olympia beer at its central warehouse (*i.e.*, that it had been purchased from BDI) (Exhibit 10). Mr. Markstein reported to Phil Hannah that BDI had made some sales to Purity Stores (Exhibit 4, Hannah deposition, page 69). Olympia's Nielsen surreptitiously checked BDI's Berkeley warehouse, discovered that "they were completely out of Olympia," then checked Safeway's warehouse and reported that Safeway had purchased 24,000 cases from BDI (Exhibit 12). The new fair trade prices had taken effect ten days after Olympia's notice (to permit reposting of new prices as required by California law)[3] (Exhibit 4, Hannah deposition, page 92). By September 9, 1967, Mr. Nielsen "was informed that some of the Louis stores are again buying from our distributor" (Exhibit 12). In other words, the fair trade program had succeeded in preventing BDI from continuing to sell Olympia beer to Louis stores since Louis could now obtain store-door delivery for no higher a price than BDI was compelled to charge for its central warehouse delivery method. Olympia's salesmen had been instructed to embark upon a crash program to call upon every chain store in California in an eight-day period (Exhibit 4, Hannah deposition, page 118). Olympia's district managers were instructed to call upon Safeway's purchasing officers in Los Angeles and Oakland to attempt to persuade this customer of BDI to switch from BDI's central warehouse method to the conventional distributor's store-door delivery method (Exhibit 4, Hannah deposition, pages 114-117). Mr. Hannah had carefully outlined the presentation to be made to Safeway in support of the store-door delivery distributors (*id.* at 116):

> "Q. What were they to say concerning the store-door delivery?

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3. In fact, BDI was the only distributor who needed to post again, since BDI was the only distributor required to change its prices (Exhibit 4, Hannah deposition, page 182).

A. They were to point out the advantages and also point out the problems that they had run into in the stores, store outages, rotation problems, and other things. We had had during this immediate period of time the authorization for a major promotion. There was inadequate supply of beer to actually put on a promotion during this period of time.

Q. What period is that?

A. Our period of display, Northern California, started on September 5th, and I believe it was to run through the weekend of September 16th."

Counsel for Olympia deny that the establishment of the fair trade program involved any "conspiracy" (Olympia brief, page 5). Yet the evidence demonstrates the very type of combination and conspiracy between a manufacturer and its distributors against an unconventional distributor such as that condemned in *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). In that case a unanimous Supreme Court found a "classic conspiracy" (384 U.S. at 140):

". . . We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. . . ."

The Court went on to point out that lack of an explicit agreement was not enough to rule out a finding of conspiracy (384 U.S. at 142-143):

". . . it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan. [Citations omitted.]

"Neither individual dealers nor the associations acted independently or separately. The dealers collaborated, through the associations and otherwise, among themselves and with General Motors, and to enforce dealers' promises to forsake the discounters. The associations explicitly entered into a

> joint venture to assist General Motors in policing the dealers' promises, and their joint proffer of aid was accepted and utilized by General Motors."

As in our case, the Court found "multilateral surveillance and enforcement" (384 U.S. at 144-145):

> "What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired objective can by no stretch of the imagination be described as 'unilateral' or merely 'parallel.' . . ."

In our case, Olympia and its distributors acted to remove from the market BDI which stood alone in its class of warehouse distribution traders offering a price reflecting the economy of that method of distribution (Exhibit 4, Hannah deposition, page 182).

Quite recently, in *Albrecht v. Herald Co.,* 1968 TRADE CASES, para. 72,373, the Supreme Court reversed denial of plaintiff's motion for judgment notwithstanding the verdict to hold that conduct of a newspaper publisher and its distributor against another distributor, deemed "unilateral" by the Court of Appeals, as a matter of law violated the Sherman Act's prohibition against "combinations" (1968 TRADE CASES para. 72,373 at 85,073):

> "On the undisputed facts recited by the Court of Appeals respondent's conduct cannot be deemed wholly unilateral and beyond the reach of § 1 of the Sherman Act. That section covers combinations in addition to contracts and conspiracies, express or implied."

The Court then found that The Herald Co. had participated in an illegal combination on the basis of conduct very similar to that directed by Olympia and its distributors against BDI (*ibid.*):

> ". . . there can be no doubt that a combination arose between respondent, Milne, and Kroner to force petitioner to conform to the advertised retail prices. When respondent learned that petitioner was overcharging, it hired Milne to solicit customers away from petitioner in order to get petitioner to reduce his price. It was through the efforts of Milne, as well as because of respondent's letter

to petitioner's customers, that about 300 customers were obtained for Kroner. * * * Given the uncontradicted facts recited by the Court of Appeals, there was a combination within the meaning of § 1 between respondent, Milne, and Kroner, and the Court of Appeals erred in holding to the contrary."

In our case, the conduct of the Olympia-distributor combination was much more coordinated and concerted than that found illegal in *Albrecht*. As in *Albrecht*, Olympia and the distributors solicited BDI's customers, and achieved the result of persuading them to stop dealing with BDI (*supra* at p. 10, *infra* at p. 19). In our case, both the fair trading directed against BDI and the eventual termination were the culmination of a long campaign by distributors (*supra* at p. 7). The fair trading was achieved, necessarily, by contractual agreement (*supra* at p. 9). When Olympia refused to deal with BDI, the distributors unanimously followed suit, after discussing it with Olympia (Exhibit 14; Exhibit 4, Hannah deposition, pages 103, *et seq.*).

Olympia's subsequent termination of BDI was admittedly done because the fair trade program had not been entirely effective in preventing BDI from making sales (Exhibit 6, Morgan deposition, pages 10-11):

"A. Well, Mr. Hannah walked into my office and said, 'Well, we have some orders from BDI.'

* * * * * * *

Q. And what did you say?

A. I said, 'Well it looks like we will have to make a decision.'

Q. And what did he say?

A. This was late in the afternoon, and he said, 'We will probably set up a meeting with Mr. Schmidt.'

* * * * * * *

Q. What was the decision you had reference to?

A. Ship or not to ship."

Mr. Hannah's testimony, too, reveals that it was the receipt of BDI's orders that made it necessary to take the further step of terminating BDI (Exhibit 4, Hannah deposition, page 127):

"Q. Before the meeting, did you tell Mr. Schmidt or Mr. Morgan that you had received these orders?

A. Yes, sir.

Q. And what did you say in that regard?

A. I said, 'We ought to have a meeting on it,' or Bobby, one of us said, I think, that we ought to have a meeting now that we have the order."

The testimony of Olympia's president is to the same effect and further reveals Olympia's concern that BDI had been able to make sales to new customers (Exhibit 5, Schmidt deposition, pages 66-67):

"A. Well, the orders came in, it was necessary for us once again to, you might say, have a meeting and decide what we were going to do.

* * * * * * *

Q. Did you discuss whether it [beer ordered by BDI] was to go to some customer other than Safeway or not?

A. I think we might have. Yes, we did."

Mr. Hannah testified that the problem of continuing to accept BDI's orders during litigation didn't cross his mind (Exhibit 4, Hannah deposition, page 134).

In the face of this evidence, counsel for Olympia claim that the "sole basis" on which Olympia decided to terminate BDI was that BDI had brought this suit (Olympia brief, page 7). The suit was filed August 30, 1967 (R. 1). Mr. Hannah learned about it on September 1st (Exhibit 4, Hannah deposition, page 122). While all three of the Olympia officers mentioned the suit as a ground for termination, the timing of their meeting of September 7th, at which the termination was decided, immediately on receipt of the new BDI orders, demonstrates that the reason for BDI's termination was the threatened sale by BDI to customers in territories assigned other wholesalers.

Apart from that proof of Olympia's primary and immediate purpose in terminating BDI, it is no defense for Olympia to claim that it terminated BDI because BDI had filed suit against Olympia for violation of the antitrust laws. Until the recent decision of the Supreme Court in *Albrecht v. Herald Co.*, 1968 TRADE CASES

para. 72,373, there had been a split among the circuits on the question whether a *unilateral* termination (unlike Olympia's termination of BDI resulting from a combination) of a distributor for asserting rights under the antitrust laws was actionable.

The Court of Appeals for the Eighth Circuit had held in *Albrecht v. Herald Company*, 367 F.2d 517, 523 (8th Cir. 1966), that the defendant newspaper publisher had a legal right to terminate the plaintiff for filing an antitrust suit against it. The Court had cited, as authority for the proposition, the case relied upon by Olympia, *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) (Olympia brief, page 23). In *Albrecht*, the Supreme Court reversed as a matter of law, holding that it was error for the Court of Appeals to affirm the judgment of the District Court which had denied plaintiff's motion for judgment notwithstanding a verdict for defendant (1968 TRADE CASES, page 85,075). The Supreme Court noted in its opinion, without further comment (*id.* at 85,073), that the plaintiff had been terminated "in response" to the filing of the antitrust suit.

Thus, the Supreme Court holding endorsed the doctrine of the other line of cases that termination of a distributor for filing suit under the antitrust laws cannot be justified whether or not it is unilateral. This line of cases is exemplified by Judge Sweigert's opinion in *F. K. Weingartner v. Union Oil Co. of California*, 1966 TRADE CASES para. 71,757 (N.D. Cal 1965), granting a preliminary injunction against a refusal to deal despite defendant's claim that it could not be enjoined from terminating relations with a plaintiff who had sued it. In that case Judge Sweigert rejected the conflicting ruling in *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) (Olympia brief, page 23), and followed that of the Third Circuit in *Bergen Drug Company v. Parke, Davis & Company*, 307 F.2d 725 (3rd Cir. 1962). (1966 TRADE CASES, page 82,501).

In *Bergen Drug Company v. Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962), the Court reversed and remanded *with directions to grant a preliminary injunction* enjoining defendant from refusing to deal with plaintiff although the undisputed

reason for the termination had been the filing of suit under the antitrust laws. The Court stated (page 727):

> ". . . The undisputed facts here are that the buyer-seller relationship was discontinued because of the filing of the main action. True enough, the defendant can choose customers, but it should not be permitted to do so in order to stifle the main action, especially where it is apparent that such conduct will further the monopoly which plaintiff alleges defendant is attempting to bring about and which, if proved, would entitle plaintiff to permanent relief. . . ."

Olympia would avoid a meaningful decision from this Court by urging (1) that the facts were disputed (Olympia brief, pages 2-7), and (2) that the District Court ignored the facts and acted under some equitable power to maintain the status quo "extrinsic of antitrust considerations" (*id.* at 11). To the contrary, the error was one of law (BDI opening brief, page 15); the District Court explained that it would not prohibit Olympia from using California's fair trade law (R.T. October 3, 1967, pages 10, 41-42). It would have been clearly erroneous for the District Court to have made any finding other than that Olympia's actions in fair trading and subsequently terminating BDI were taken to enforce Olympia's illegal territorial and customer restrictions (*supra* at p. 6). Since findings have been waived by the parties (R.T. October 3, 1967, page 65), and since the Court's conclusions were based upon an erroneous "application of a legal standard" to documentary evidence, this Court "need give no weight to a trial court's conclusions of law," *Lundgren v. Freeman,* 307 F.2d 104, 115 (9th Cir. 1962); *Fleischmann Distilling Corp. v. Maier Brewing Company,* 314 F.2d 149, 152 (9th Cir. 1963).

2. The state law does not prevent this Court from enjoining the use of fair trade contracts to enforce a system illegal under the Sherman Act.

Claiming that "BDI's appeal is a disguised attack on California's fair trade laws" (Olympia brief, page 12), Olympia devotes an entire section of its brief to an argument of the legality under California law of fair trading at the wholesale level without ref-

erence to its use to accomplish an illegal object.[4] Completely overlooked is the very issue we have raised: that acts wholly innocent in themselves are illegal when they constitute "means used to accomplish the unlawful objective." Olympia has chosen not to argue *American Tobacco Co. v. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946) (BDI opening brief, page 14), and the other cases we cited to the same effect (BDI opening brief, pages 14-18) as beside the point and unworthy of an extension of Olympia's brief (Olympia brief, page 16). To explain its failure to meet this vital legal issue in the case, Olympia effortlessly assumes the point—it assumes that it has not violated the antitrust law (Olympia brief, page 16):

> ". . . Whatever may be the rule when one uses a statutory exemption to violate the antitrust laws, that rule will not apply if one does not violate the law. . . ."

We submit, then, that, although by default, Olympia has admitted the point of law which was a basis for denial of the injunction against Olympia's fair trade program in the court below (BDI opening brief, page 15). The cases in our opening brief which Olympia refused to extend its brief to answer, establish that if "one uses a statutory exemption [including fair trade] to violate the antitrust laws," such otherwise lawful means should be enjoined (BDI opening brief, pages 14-18).

3. Olympia's assertion—without demonstration or argument—that BDI has made no case for injunctive relief is no justification for delay of relief to BDI.

Olympia argues first (Olympia brief, page 18) that the injunction should not be directed because the case does not warrant "extraordinary treatment." Apparently this point is intended to be proven by two subpropositions stated at page 19: that "BDI did not carry its burden of proof"; and that "the lower court was properly reluctant to resolve the ultimate factual issues on which this case turns."

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4. We do not concede its legality under state law, but on this appeal have emphasized misuse of the fair trade laws by Olympia.

Olympia's claim that we haven't proven our case is answered in detail above (*supra* at pp. 3-14). Olympia has made no factual analysis showing that the cases cited (Olympia brief, page 19) have any particular significance to the facts of our case. Our proof speaks for itself.

Olympia's second proposition in support of its argument that we have made no case is that the decree sought by BDI would alter the status quo (Olympia brief, page 18). In support of this proposition, Olympia quotes *Hershel California Fruit Products Co. v. Hunt Foods,* 111 F.Supp. 732 (N.D. Cal. 1953), to the effect that "preservation of the status quo should not be confused with the economic stabilization of a whole industry" (Olympia brief, page 20).[5] That admonition is inapplicable to our case in which *only BDI's* prices were affected by Olympia's fair trade program, since no other distributor but BDI had been selling below the minimum prices so established (Exhibit 4, Hannah deposition, page 182). Nevertheless, the *Hershel California* opinion is helpful since it spells out the accepted definition of "status quo" (111 F.Supp. at 734):

> ". . . The term 'status quo' ordinarily refers to the last actual peaceable, noncontested status of the parties to the controversy which preceded the pending suit and which should be preserved until a final decree can be entered."

Since Olympia does not contest the legality of BDI's notice that it intended to commence selling to new customers (R. 74, 76), nor its sales to them, there seems no other conclusion than that "the last actual peaceable, noncontested status of the parties to the controversy which preceded the pending suit" was the status immediately prior to the effective date of the fair trade program of which BDI complains.

In support of its final proposition against injunctive relief, that BDI would not suffer irreparable harm if the decree were denied (Olympia brief, page 18), Olympia has made no effort to dis-

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5. This is also the third point urged by Olympia (Olympia brief, page 18).

cuss the evidence. BDI's factual evidence of irreparable injury thus stands unchallenged: Until the fair trade program, Olympia products constituted over 25% of BDI's business (R. 66). BDI's unique appeal to customers is based upon its ability to distribute multiple brands at the retailer's warehouse, and it is likely that BDI will lose some of its customers entirely if it is prohibited for very long from supplying Olympia beer at warehouse distribution prices on the same basis as its few other popular beers (R. 118). BDI relies upon bank financing which may be difficult or impossible to secure with Olympia sales dwindling or eliminated (R. 119-120). The damages resulting from such a drastic cutback in BDI's operations (whether from total loss of Olympia sales or partial loss due to retailers' lack of interest in warehouse deliveries at high store-delivery prices) are difficult if not impossible to calculate (R. 250, et seq.). These calculations would be much more difficult as to BDI's new Olympia customers as to whom the base period of sales was much shorter (R. 253-254). BDI has already lost the Olympia business it had commenced to develop with Louis Stores and Purity Stores (Exhibits 12, 13).

We submit that Olympia's unsupported assertions that BDI has not proved irreparable damage are as untenable as the other Olympia assertions discussed above.

4. There is no merit to Olympia's appeal from the limited injunction which the Court did grant.

Olympia's argument that it was deprived of a right to exercise a free choice of customers (Olympia Brief at 23) misstates the law: contract or not, Olympia was not entitled to terminate relations with a customer in furtherance of conduct which violates the antitrust laws (*supra* at pp. 11-16). Fatal to Olympia's appeal, and a vital consideration on BDI's appeal, is Olympia's assumption (which it contends is not a concession) "that it will not suffer irreparable damage by continuance of the preliminary injunction until trial" (Olympia brief, page 22).

CONCLUSION

We think we have demonstrated that there is no bona fide dispute as to the basic facts. Nor can defendant eliminate the governing law by refusing to argue it. A definitive decision of this Court on the merits of the simple issues presented will give prompt and effective justice, whether for plaintiff or defendant. A practical step will have been taken to reduce the congestion, confusion and futility of needless delay in adjudication. We ask that this Court enjoin the application of Olympia's fair trade program to BDI, eliminate the volume limitation conditioning the injunction against refusal to deal, and affirm the remainder of the order.

Dated: March 28, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

B. H. PARKINSON, JR.
Attorney

(Appendices Follow)

Appendix 1

Admissions of Counsel for Olympia as to Purpose of Fair Trading:

"Mr. Parkinson: Let me put it the way we see it, if Your Honor please. I think it is clear, and they have admitted, that they fair-traded because of BDI's announcement that they were going to sell to others. It's just——

"The Court: Well, do you concede that?

"Mr. Parkinson: It can't be denied.

"The Court: Seems to me that you do.

"Mr. Toy: Stated that way, I think I might quibble with the words a little bit, Your Honor, but in substance that is a fair statement.

"The Court: I want to give you an escape hatch.

"Mr. Toy: I don't think there is a big dispute about it, though.

"The Court: So defendant admits your point. Want a page number on that?

"Mr. Parkinson: Yes, please, Your Honor.

"The Court: Okay.

"Mr. Parkinson: Secondly, I think it's also undeniable that the purpose of the fair-trading was to prevent, if possible, BDI from making these sales to other customers and in other territories. And I ask counsel if he will concede that as well.

"Mr. Toy: Certainly will not.

"The Court: Why not?

"(To the Reporter.) Read the question by Mr. Parkinson again.

"Now don't let me lead you into error. I am just asking you.

"(Record read.)

"Mr. Toy: Well, Your Honor, if Mr. Parkinson is attempting to get me to concede that we were telling BDI they couldn't sell to somebody else, I will deny it.

"The Court: No, he is not saying that. That question doesn't say what you say. That question goes to purpose. Wasn't it the purpose of your client to prevent the plaintiff, to do what it could

to prevent the plaintiff from making sales to others than Safeway; and indeed, as a matter of fact, by this time probably to Safeway.

"Mr. Toy: I will concede that one of the primary purposes of Olympia in fair-trading was to discourage an extension of the central warehouse form of distribution, which I understand from Mr. Girard's testimony is the only method of distribution of Olympia beer which BDI contemplated.

"The Court: All right. Then it seems to me your answer, to put it in somewhat different words, is that a primary or major consideration for fair-trading was to prevent BDI from selling at less than a wholesale fair-trade price to any central warehouse retailer, with the view that one of the effects of fair trading would be to make it difficult if not impossible for sales to be made by BDI.

"Mr. Toy: All right, Your Honor. But I think that's a far cry from saying that we intended to prevent them selling other customers or in other territories." (R.T. 93-95)

Appendix 2

Testimony of Olympia President Robert Schmidt Concerning Olympia's Consideration of Effect Upon Other Distributors of Sale by BDI to New Customers:

"Q. Did you discuss the effect that any one of these alternatives might have upon your distributor organization?

A. I don't think that it was necessary to discuss it. Any good sound businesman in this situation just knows.

Q. You had been told over the years what the attitude of the distributor was as to BDI, of course?

A. Certainly.

Q. And did you discuss this attitude in this conversation with Mr. Hannah?

A. I don't think so, not at this time.

Q. I take it it wasn't necessary?

A. No, I didn't.

Q. Did you discuss the request that the distributors had been making over the years?

A. Not at this point.

Q. And did you discuss any action that your distributors might take if you continued to deal with BDI?

A. I can't specifically recall, but I think—Well, I know that I knew what this would mean, what it could mean.

Q. In what respect? What do you mean by that?

A. Once again, that we would not have an orderly distribution of our product. We would have a good chance that our product would just fall into limbo because it would not have proper merchandising, proper sale, proper distribution, particularly in the smaller accounts, particularly into the, let's say, on-sale premises, things like this.

Q. Did you discuss possible retaliation by any of your other distributors?

A. No.

Q. Did you have that in mind?

"Mr. Toy: What do you mean by retaliation, counsel?

"Mr. Parkinson: Any action he might take. The witness started to answer.

A. I don't think so, no.

Q. You didn't discuss that?

A. No. I know we didn't discuss it at that point.

Q. In your opinion, would your distributors have been unhappy if you had continued to deal with BDI on the previous basis after they commenced selling to others than Safeway?

A. You say would they be unhappy?

Q. Yes.

A. If BDI was allowed to sell to other people than Safeway?

Q. Yes.

A. I think that is quite obvious, yes.

Q. They would be unhappy?

A. I think that they would be.

Q. Do you think that you would have received any complaints from them?

A. If they were losing business and losing markets?

Q. Yes.

A. Yes, I think we would."

(Exhibit 5, Schmidt deposition, pages 58-60)